

The Ends of Consent

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1 Introduction

In the preamble to the Vienna Convention on the Law of Treaties (VCLT) it is ‘noted’ that ‘the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized’.¹ What is to be made of this prefatory affirmation, however, is less clear. On the one hand, and as was consistently reiterated through the drafting of the Convention at the hands of various Special Rapporteurs in the International Law Commission, the idea of free consent appears to be an indispensable ingredient in any understanding of the law of treaties. As Sir Gerald Fitzmaurice was to put it, the ‘mutual consent of the parties, and the reality of consent on the part of each party, is an essential condition of the validity of any treaty’.² On the other hand, however, the very ubiquity of consent as an analytic – governing everything from the underpinnings of treaty obligation (*pacta sunt servanda* and good faith), to processural dimensions (competence, signature, ratification, accession and approval), conditions of validity (capacity, error, fraud, mistake, coercion), interpretation (*travaux préparatoires*) and effect (*pacta tertiis* etc.) – is such as to make it very much more difficult to isolate what consent actually means in this context.³ Whether, for example, it is to be understood as the instantiation of a practice of autonomy (self-rule),⁴ as a processural trigger providing for

¹ 1155 UNTS 331. See, also, the preamble of the 1978 Vienna Convention on Succession of States in Respect of Treaties: 1946 UNTS 3.

² G.G. Fitzmaurice, Third Report on the Law of Treaties, Doc. A/CN.4/115 and Corr. 1 (18 March 1958), p. 25 (paragraph 7).

³ For a discussion of the ‘different kinds of consent’, see S. Rosenne, “‘Consent’ and Related Words in the Codified Law of Treaties” in S. Rosenne (ed.), *An International Law Miscellany* (Dordrecht: Martinus Nijhoff, 1993), pp. 357–377.

⁴ See, e.g., G. Jellinek, *Die rechtliche Natur der Staatenverträge: ein Beitrag zur juristischen* (Vienna: Alfred Hölder, 1880). In the field of contract law, see C. Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1980).

the imposition of certain obligations⁵ or as a convergence of wills (a meeting of minds)⁶ may depend upon where one starts, or which aspects of treaty law one takes as fundamental. In that sense, the most significant or, perhaps, elucidatory features of the law of treaties (if one understands it as a systemically coherent enterprise) might be thought to be found in the places in which consent appears to be either entirely absent (duress, succession, objective agreements) or where its effects are systematically constrained by other factors (*rebus sic stantibus*, necessity, *force majeure* and *jus cogens*). Only, it might be argued, by looking at the limits of freedom of contract may one discern what it is that such freedom seems to imply or entail.

This itself may immediately put a number of questions in the frame: To what extent is consent indispensable for the assumption of obligations under treaties? May conventional obligations be assumed/imposed absent consent? What is required by way of consent? What is its practical content? In what contexts is consent sufficient/insufficient, effective/ineffective? At what moments may it be left aside? If, in method, I am attracted to the idea that the positive content (if any) of the idea of consent is to be discerned through the medium of its potential displacement (the point at which it 'ends'), there is also another sense of its 'ends' to which I also want to draw attention – that which concerns what it enables or produces as a discursive practice. My hypothesis, here, is that the idea of consent is more than simply an instrumental medium by which other things are to be achieved (as a vehicle for social transactions of one kind or another) but operates as a way of producing that to which it seeks to give effect: namely, a legal world configured around the idea that it is the systematic outcome of acts of collective free will rather than of coercion. Consent, in other words, takes itself as its own end.

Lying behind this general hypothesis are two related theoretical or methodological intuitions. The first is that consent, as an idea, operates as a way of linking domestic and international authority by seeking to secure the validity of international transactions by reference to the

⁵ G. G. Fitzmaurice, Second Report on the Law of Treaties, Doc. A/CN.4/107 (15 March 1957), p. 42, n. 33 ('Consent is only a method ... by which obligations arise or come into force; but it is not the foundation of the binding force of the obligation once it has come into force. It is not consent that makes consent binding, for if it depended on that it would be necessary to provide yet another principle in order to give it juridical force to the consent that made consent binding'). See, further, G. G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', *Modern L. Rev.*, 19 (1956), 1–13, at 8.

⁶ Cf. Arts. 31 and 32 VCLT: *supra* n. 1.

conditioning grounds of (territorial) sovereignty. This is not to say, however, that its content has remained entirely stable over time. Indeed, despite the adoption of a position of ostensible neutrality towards the operative conditions of domestic political arrangements, one may note a general shift from a conception of consent premised upon the keeping of the sovereigns' promises to a modern, popular, perhaps democratic, notion of consent as 'self-rule'.⁷ Whether or not there be a right to democratic government or to popular control over the exercise of foreign policy, the practice of consent (by which I mean both the performance of formalities by which a State engages itself internationally and the rhetoric that underpins it) is such as to keep those agendas alive.

The second, related, intuition is that that if consent is to operate as a category of evaluation against which one might test the validity of international transactions, it does so not because it is intuited that the necessary conditions are already in place but because (in part at least) it seeks to operationalize those conditions and bring them into fruition. Consent, in these terms, is better understood as a practice concerned with the 'production' of both domestic and international authority through the performance of a range of largely formal, and symbolic, acts the purpose of which is to demonstrate the existence of a pre-existent right to govern but yet on grounds that are constantly in the process of being established. As such, one is left with the almost impossible formulation: 'the practice of consent is concerned with the production of consent as desire'.

In the course of this chapter, I will attempt to elucidate these ideas in three stages: first through a discussion of the place of consent, more generally, in international law outlining its productive characteristics; secondly through a brief account of its emergence in international legal history; and finally through an account of its 'limits' that brings to the fore the problem of producing an idea of consent that is 'authentic' under conditions of social constraint.

2 Consent and Will

If consent appears, most visibly, as a structuring feature of treaty law, it may nevertheless be said to reflect a more general condition of international law. As the Permanent Court of International Justice suggested in

⁷ On which, see P. Allott, 'Power Sharing in the Law of the Sea', *AJIL*, 77 (1983), 1–30, at 24–25.

the *Lotus Case*, consent was to be understood as a fundamental legitimating condition: 'the rules of law binding upon States' are only those that 'emanate from their own free will'.⁸ This was to emphasise at least two (somewhat contrasting) ideas. In the first place, it was to identify a common ground for both custom and treaty law.⁹ Rather than imagine treaties as being merely formal, 'private' arrangements concluded under cover of general law (the law of treaties), it was to provide a rationality that enabled one to link the substantive content of treaties to the emergence of general international law (in which both formal and tacit consent is registered). As Sir Hersch Lauterpacht was to put it, consent could thus be understood as a 'formal source' which 'finds its partial materialization in custom and treaty which sit in relation to it as material sources'.¹⁰ Treaties, on this score, are not merely formalised through consent (to obligation) but are also evidence of consent (to law). In the second place, if the Permanent Court was overtly to assert a broadly 'empirico-positivist' conception of law here (one whose sources were confined to the material practices of States), it was also to situate this within a broader legal environment in which States were presumed to enjoy an otherwise untrammelled freedom of action. Treaty-making, on such an analysis, takes the character of a restriction on the sovereignty of States assumed in virtue of an act of self-limitation in which the demonstrable characteristics of 'consent' are the key. Thus, as the Permanent Court was to suggest in the *Wimbledon Case*, a treaty engagement might

⁸ *The Case of the S.S. 'Lotus' (Judgment)*, 1927 PCIJ, Series A, No. 10, 18.

⁹ Rasulov suggests that this commonality is no longer apparent in 'modern doctrinal consciousness' in which the 'processes of customary norm-production must ultimately be grounded in the logic of *belief* and *perception* ... rather than any kind of *tacit consent* or *deliberate choice*'. See A. Rasulov, 'The Doctrine of Sources in the Discourse of the Permanent Court of International Justice' in C. J. Tams and M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice* (Leiden: Martinus Nijhoff, 2013), pp. 271–318, at p. 276. For an early critique of the mythic character of consent, see J. L. Brierly, *The Law of Nations* (H. Waldock ed.) (Oxford: Clarendon Press, 1963), pp. 52–53 ('The truth is that states do not regard their international legal relations as resulting from consent except where the consent is express, and that the theory of implied consent is a fiction invented by the theorist').

¹⁰ See H. Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', *BYIL*, 10 (1929), 65–95, at 81. For an early statement, see G. F. de Martens, *Précis du Droit des Gens Moderne de L'Europe* (Vol. I) (Paris: Guillaume & Co., 1838), Ch. ii, s. 46 (in which he distinguishes between three categories of 'volonté' – express, tacit or presumed – that give rise to three sources of law – 'conventions expresses', 'conventions tacites' and 'l'observance ou l'usage'). For a review of the late-nineteenth- and early-twentieth-century literature, see P. E. Corbett, 'The Consent of States and the Sources of the Law of Nations', *BYIL*, 6 (1925), 20–30.

be said to consist of a 'restriction upon the exercise of sovereign rights of the State' enacted in consequence of an exercise of sovereignty.¹¹

This idea of consent as an act of 'self-limitation' has its obvious limits. It is evident, to begin with, that within the context of treaty law, consent is clearly not an unregulated phenomenon. Not only is consent in some cases ineffective or insufficient (governed by considerations of process, validity and subsequent change), but consent is also occasionally unnecessary (e.g. in case of succession to treaties).¹² Consent is also hemmed in by rules relating to duress and the subsequent interpretation of agreements. If self-limitation remains a viable descriptive category, in that sense, it is an act of limitation capable of being performed only under terms already largely determined in advance. And this is to draw attention to the way in which the Vienna Convention itself both performs and subverts its own content. On the one hand, as a treaty, it is conditioned by the effectiveness of the rules it elaborates (the rules contained within the Convention stipulating the effect of its own ratification); on the other hand, it also purports to establish rules whose application necessarily exceed the limits of its own form (these are general rules, not simply rules for the contracting parties).¹³

In the second place, there is a question as to whether the generic standpoint articulated in the *Lotus Case* is analytically coherent as a way of understanding the effect of consent in treaties. To some degree, this is a question that goes to the different implications of the two terms in operation here: 'will' and 'consent'. An act of 'will' has distinctively active connotations suggestive of a power or a capacity to create law. Consent, by contrast, seems to evoke a passive idea of acceptance or of a dutiful concession. Each speaks in a particular way to the text of a treaty: one as the desire to impose obligations on others, the other as an

¹¹ *Case of the S.S. 'Wimbledon'*: France, Italy, Japan and United Kingdom v. Germany (Judgment), 1923 PCIJ, Series A, No. 1, 20, at p. 25. To the same effect, see *Case Concerning Military and Paramilitary Activities in and against Nicaragua*: Nicaragua v. United States of America (Merits) (1986) ICJ Rep. 14, at p. 131 (paragraph 259) ('A State . . . is sovereign for the purpose of accepting a limitation of its sovereignty [by way of treaty]'). Rasulov adds a suggestive gloss to this: 'the more effectively the given state finds its hands tied by international law, the more convincingly it thus reaffirms its sovereignty': Rasulov, *supra* n. 9, at p. 279.

¹² See pp. 122–126.

¹³ See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2nd ed., 1984), pp. 3–5. It was for such reasons that Fitzmaurice had moved towards the drafting of an expository code. See G. G. Fitzmaurice, First Report on the Law of Treaties, Doc. A/CN.4/101 (14 March 1956), p. 106 (paragraph 4).

agreement to have obligations imposed upon oneself. Each also conceptualises the relationship between law and power in particular ways – one (will) as conjunctive or accumulative, the other (consent) as negative or subtractive.

That the Vienna Convention speaks of consent rather than will is, in that sense, to draw attention to the general idea that treaties are primarily vehicles for the assumption of obligations or for the limitation of authority rather than instruments that confer power and legal authority. This is reinforced, in part, by the occasional substitution of the word ‘consent’ by that of ‘assent’ (Article 36 VCLT) and ‘acquiescence’ (Article 45(b) VCLT), both of which maintain the metaphorical stance of subordination, even if their purpose may be to signal the legal relevance of actions or omissions beyond the formalities laid down in Articles 11 to 15 VCLT for purposes of determining the validity of obligations in relations between different States.¹⁴

Nevertheless, even if ‘consent’ carries with it a notion of subordination (with its associated metaphorical allusion to ‘bondage’), there are at least four different ways in which one may understand consent as plausibly extending, as opposed to merely limiting, authority. In the first place, it may be seen to be a function of the standard synallagmatic correlation that has long been recognised in juridical thought¹⁵ – in each case a State assumes an obligation under an international agreement, so also does it create certain rights for other parties to ensure the fulfilment of that obligation (the parameters of which, in case of breach, being determined by principles of State responsibility).¹⁶ In the second place, and beyond the rights of enforcement, it is not infrequently the case that treaties may endow a State with authority to take certain measures that would not otherwise be available to it (e.g. to allow the exercise of immigration

¹⁴ Rosenne differentiates between the ‘comprehensive’ conception of consent (consent to be bound) that is associated with the performance of the formalities outlined in Arts. 11 to 15 and that which he calls ‘consent *simpliciter*’ that is found in Art. 9 (relating to the adoption of the text); Art. 22 (concerning objections to, or withdrawal of reservations); Arts. 34, 36 and 37 (relating to the establishment, revocation or modification of rights of third States); Art. 54 (relating to termination or withdrawal) and Art. 57 (relating to suspension) of the Vienna Convention: *supra* n. 3, at pp. 259–260.

¹⁵ W. N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, *Yale Law J.*, 23 (1913), 16–59.

¹⁶ See, e.g., *Questions Relating to the Obligation to Prosecute or Extradite*: Belgium v. Senegal (Judgment) (2012) ICJ Rep. 422, at p. 449.

powers in the territory of other States¹⁷ or provide for the overflight of civilian or military aircraft).¹⁸ Both of these first two categories, however, operate within the standard framework of consent in the patrimonial sense of rights being ‘transferred’ from one party to another under conditions of exchange.¹⁹

In other cases, however, the conception that consent invariably involves the ‘conferral’ or ‘transfer’ of legal authority through the medium of an exchange is somewhat more difficult to sustain. In the case of powers assumed by members of the UN Security Council under Chapter VII of the 1945 United Nations Charter,²⁰ for example, it is only with some difficulty that one might imagine such authority being ‘transferred’ from individual members of the United Nations given that no individual State possessed parallel authority prior to the creation of the United Nations.²¹ In a similar sense, treaties providing for the exercise of universal jurisdiction (such as over pirates on the high seas)²² can only be

¹⁷ See, e.g., 2007 Italy-Libya Bilateral Cooperation Agreement to Combat Clandestine Immigration, cited in *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights (Grand Chamber), Judgment, 23 Feb. 2012.

¹⁸ See, e.g., 1944 Chicago Convention on International Civil Aviation, 15 UNTS 295 (which first establishes that ‘every State has complete and exclusive sovereignty over the airspace above its territory’ (Art. 1) and then continues by establishing, under certain conditions, rights of entry and overflight).

¹⁹ *North Sea Continental Shelf Cases*: FRG/Denmark; FRG/Netherlands (Judgment) (1969) ICJ Rep. 3, at pp. 25–26 (paragraph 28): ‘if . . . a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form’. For a critique of the contractual model as a way of understanding human rights agreements (and the proposal that they should be treated as straightforward ‘pledges’), see L. Brilmayer, ‘From “Contract” to “Pledge”: the Structure of International Human Rights Agreements’, *BYBIL*, 77 (2006), 163–202.

²⁰ 1 UNTS 16.

²¹ It is true that Art. 24(1) of the United Nations Charter, *ibid.*, speaks of member States ‘conferring’ on the Security Council primary responsibility for the maintenance of international peace and security and that in discharging its duties it ‘acts on their behalf’, but it is equally clear that this is intelligible only so far as it is framed as a collective endeavor operating within an institutional setting in which the UN has certain designated ‘functions’ or ‘responsibilities’. It is notable that even those who support the contention that UN authority is premised upon its transfer from member States are forced to admit that this provides little basis for the assertion of ‘implied powers’. See D. Sarooshi, *International Organizations and Their Exercise of Sovereign Power* (Oxford: Oxford University Press, 2005).

²² Art. 105 of the 1982 United Nations Convention on the Law of the Sea: 1833 UNTS 3.

squared with a patrimonial conception of exchange if one assumes from the outset that individual States possessed an intrinsic capacity to take such action.²³ The rubric established in the *Lotus Case*, of course, was one that encouraged precisely this idea: that every conventional arrangement operated as a form of limit upon a legally protected privilege of sovereignty,²⁴ so what was to be exchanged would always be part of a pre-existent legal 'patrimony', or authority, that inhered in the mere fact of a State's existence. Yet even leaving aside the fact that this almost entirely obscured the conditions under which that background authority was to be produced or justified in the first place,²⁵ it had the distinctly ideological function of allowing every novel claim to authority to assume the guise of a limitation.

Finally, one may also note that by conspicuously agreeing *not* to do something there is a sense also in which States may, at the same time, be asserting for themselves the authority to do that act absent agreement otherwise. Thus, whilst the prohibition on torture or slavery found in treaties might seem to be directed towards the elimination of a practice already regarded as illegal, the very conventional character of its prohibition is only such as to strengthen the argument that, absent the agreement itself, it would not be prohibited (or, at least, not prohibited in all circumstances). Of course, as was pointed out at some length in the *Nicaragua Case*,²⁶ the argument is always available that the treaty in question merely 'codifies' customary international law or causes it to 'crystallize'.²⁷ And this has certainly been the position adopted in the case of torture.²⁸ But even so, all this does is to bring into prominence

²³ See, further, Allott, *supra* n. 7, at 26–27.

²⁴ *Lotus Case*, *supra* n. 8, at p. 19: 'Far from laying down a general prohibition to the effect that States may not extend the applicability of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable'.

²⁵ See, e.g., H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), pp. 94–96.

²⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* n. 11, at pp. 93–97 (paragraphs 174–182).

²⁷ *Ibid.*, at pp. 94–95 (paragraph 177).

²⁸ See, e.g., *Questions Relating to the Obligation to Prosecute or Extradite*, *supra* n. 16, at p. 457 (paragraph 99): 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'. The Court added, however, *ibid.*, at p. 457 (paragraph 100), that 'the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into

not merely the fact that processes of negotiation and contracting always take place against a background architecture of distributed legal authority (bargaining, as it is often said, in the ‘shadow of the law’) but that the visibility of that background (or, perhaps, its status) may only become apparent through the medium of agreements that seek to ‘limit’ that self-same authority. The act of limiting, in other words, will often be characterised by a double movement: in one direction towards the assertion of a (historic) claim to authority or dispensation to act; in another towards the recognition of a will to subordinate that authority to law.²⁹

If this is to suggest that the formative place assumed by ‘consent’ in the law of treaties may in some ways disguise the operations of authority that are brought into play as a consequence of their purported ‘limitation’, that is all the more evident when one reflects upon its phenomenology. The language of consent invites us to think about the State, in organic terms, as a morally autonomous agent capable of pursuing ‘the dictates of its own will’ and rationally promoting or defending its own ‘interests’ through the medium of international agreements.³⁰ This idea, however, has always been mediated through a conception of formal agency – exemplified by the requirement that delegates possess ‘full powers’, that treaties be subject to ‘ratification’, and by the insistence that the validity of treaty obligations is unaffected by the severance of diplomatic relations – in which the State is situated as a legitimating force behind the exercise of governmental authority but never immediately there in its own right. The State never consents, one may say, only the agents of government acting on its behalf. Consent, in that sense, brings into play two different operations: in one direction it serves as a simplifying metaphor, bracketing the internal political struggles attendant to the definition of those interests, the formulation of State policy or the capacity of the government to speak in the name of the State. In the other, however, it also operates as a way of giving visibility or meaning to the idea of the State itself – not merely as a pre-supposition of legitimate governmental activity but

force’. In other words, whilst the prohibition on torture was customary, the obligation to criminalise was exclusively conventional.

²⁹ One may note the same structure being followed in case of the Chicago Convention: *supra* n. 18.

³⁰ For an early statement, see, e.g., W. E. Hall, *A Treatise on International Law* (Oxford: Clarendon Press, 4th ed., 1895), p. 339.

as a 'structural effect' that is produced through, amongst other things, the treaty making activity undertaken in its name.³¹

3 History

It has been suggested, at least in the Anglo-American legal traditions, that the modern law of contract is fundamentally a creature of the nineteenth century, the time at which judges finally rejected the long-standing belief that the justification of contractual obligation was to be derived from the inherent fairness of an exchange and substituted in its place the idea that the source of obligation was to be found in a convergence of the wills of the contracting parties.³² It was a shift, in other words, from a substantive evaluation of the contract in terms of justice and equity to an evaluation governed purely in terms of a 'meeting of minds'. Behind this, of course, was an abandonment of a pre-physiocratic notion of the 'just price'³³ (or the idea that there might be some external measure by which the content of an exchange might be evaluated) and a corresponding adhesion to the idea that the exercise of individual will through the medium of the contract not only constituted a vital expression of individual autonomy but also contributed to the general social utility.³⁴ It was only in the nineteenth century, on this account, that consent, and consent alone, became the measure of contractual obligation – the story from there being that of the ensuing encroachment of social legislation upon the principle of contractual autonomy³⁵ and the displacement of a concern for actual intentions in favour of an attentiveness to the 'empirical' character of the agreement that is produced.³⁶

³¹ See T. Mitchell, 'The Limits of the State: Beyond Statist Approaches and Their Critics', *Am. Pol. Sc. Rev.*, 85 (1991), 77–96.

³² M. J. Horowitz, 'The Historical Foundations of Modern Contract Law', *Harvard L. Rev.*, 87 (1974), 917–956, and R. Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford, CA: Stanford University Press, 2007).

³³ See E. Bonnot de Condillac, *Commerce and Government* (1776) (trans. W. Eltis) (Cheltenham: Edward Elgar, 1997).

³⁴ See M. R. Cohen, 'The Basis of Contract', *Harvard L. Rev.*, 46 (1933), 553–592, at 558–562.

³⁵ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

³⁶ O. W. Holmes, 'The Path of the Law', *Harvard L. Rev.*, 10 (1897), 457–468, at 464 ('no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties' having *meant* the same thing but on their having *said* the same thing').

The trajectory of treaty law partly follows, and partly departs from, this account.³⁷ It is certainly clear that up until the nineteenth century, both humanist and scholastic teachings had encouraged the idea that the obligation to abide by treaties was a matter of individual virtue and good faith (*pacta sunt servanda*) and would be guided by principles of equity and justice (*ex aequo et bono*). Strict adherence to what was promised would not always be recommended, particularly if considerations of necessity or survival were at stake. In the same sense, however, it was recognised that the forms of equality that underpinned the validity of individual contracts (equality of knowledge, bargaining power and substance)³⁸ were not uniformly evident in case of treaties. Treaties, as Hugo Grotius was to explain, could be equal or unequal, could assume the form of an equivalent exchange or could result in the diminution of sovereignty of the other party.³⁹ Treaties of peace were invariably at the forefront of analysis.⁴⁰ If justice, equity and good faith were still the primary conditions, they did not automatically deny the validity of agreements substantially unequal in character – indeed, if anything, that was the exception.⁴¹

By the end of the eighteenth century, however, treaties started to acquire the marks of an autonomous source of law, and, as such, emphasis was placed upon the meeting of minds or upon the expression of a ‘mutual will’ through reciprocal consent to the terms of the agreement. This had several consequences. In the first place it became apparent that, since the value of an exchange had no external measure,⁴² it was

³⁷ See, generally, the contribution to this volume of Lesaffer at pp. 43–75 (Chapter 3). See, also, D. W. Bowett, Review of Evangelos Raftopoulos, *Inadequacy of the Contractual Analogy in the Law of Treaties* (1990), *BYIL*, 64 (1993), 439.

³⁸ H. Grotius, *De Jure Belli ac Pacis* (trans. F. W. Kelsey) (Washington, DC: Carnegie Endowment for International Peace, 1925), Bk. II, Ch. xii, pp. 346–350.

³⁹ *Ibid.*, at pp. 394–397.

⁴⁰ See R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge: Cambridge University Press, 2008).

⁴¹ See E. de Vattel, *The Law of Nations or the Principles of Natural Law* (trans. C. G. Fenwick) (Washington, DC: Carnegie Endowment for International Peace, 1916), Bk. II, Ch. xii, pp. 161 and 164. Various exceptions were recognised, however: treaties ‘disastrous to the state’ are void (p. 161) as are treaties conflicting with the duty of the nation to itself (p. 164).

⁴² See J. L. Klüber, *Droit des Gens Moderne de L’Europe* (Stuttgart: J.G. Cotta, 1819), p. 226, and de Martens, *supra* n. 10, at pp. 168–169 and 185. One may relate this to Hume’s reformulation of the idea of ‘free will’ in which, he argued, it was to be construed as acting in accordance with one’s will as opposed to having the freedom to have acted otherwise: D. Hume, *A Treatise of Human Nature* (Oxford: Clarendon Press, 1739), pp. 399–412.

impossible to determine in any abstract way what interest States might have in the bargain. Thus, as Georg Friedrich de Martens was to maintain:

The injury . . . that a nation may sustain from a treaty, is not a justifiable reason for such nation to refuse complying with its conditions. It is the business of every nation to weigh and consult its own interests; and, as nothing hinders a nation from acquiring a right in its favour by a covenant with another, and it being impossible for any one to determine the degree of injury requisite to set a treaty aside, or to judge, in any obligatory manner, of the injury sustained, the security and welfare of all nations require, that an exception should not be admitted which would sap the foundations of all treaties whatever.⁴³

Consent, thus, when mediated through the abstract idea of the ‘interest’ a State may have in coming to agreement with another,⁴⁴ was incapable of being rationalised in any kind of material balance. The equality of the agreement understood in terms of the value of what was exchanged – a material or substantive reciprocity – was excluded from the outset.⁴⁵

In the second place, if the abstract notion of a meeting of wills was to deny, in principle, any means of evaluating the equivalence of an exchange, it was nevertheless premised upon the idea that an exchange had indeed taken place. Yet this was by no means always obvious. The Ottoman capitulations⁴⁶ (and, to a lesser extent, the regimes of consular jurisdiction in China and Japan)⁴⁷ were particularly problematic in this respect. As one commentator was to observe, the word ‘capitulation’ (letter of privilege) had historically been used to ‘indicate that these were not stipulations between two contracting parties, entered into for their reciprocal good, but only grants of privileges and immunities that the Porte made, out of its generosity, to the nations with whom

⁴³ G. F. von Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (trans. W. Cobbett) (Philadelphia, PA: Thomas Bradford, 1795), ii, p. 52.

⁴⁴ For an account of the role of ‘interest’ in the thought of Kelsen, in particular, see M. Garcia-Salmones, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013).

⁴⁵ See, e.g., H. Wheaton, *Elements of International Law* (Boston, MA: Little, Brown & Co., 8th ed., 1866) (R. H. Dana ed.), p. 44.

⁴⁶ E. A. Van Dyck, *Capitulations of the Ottoman Empire* (Washington, DC: U.S. Govt. Printing Office, 1881) and T. Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China* (Cambridge: Cambridge University Press, 2010), pp. 104–148.

⁴⁷ See, e.g., F. E. Hinckley, *American Consular Jurisdiction in the Orient* (Washington, DC: W.H. Lowdermilk & Co., 1906) and Kayaoglu, *supra* n. 46, at pp. 66–103 and 149–190.

it dealt'.⁴⁸ That they appeared to represent gratuitous concessions rather than reciprocal engagements, in fact, was subsequently taken by Turkey to be a ground to justify their unilateral denunciation (or, perhaps better, their 'withdrawal').⁴⁹ The Turkish claim, here, was not unique. A similar argument had also been advanced by the Tsar of Russia who abolished the status of Batoum as a 'free port' (as so designated under Article 59 of the 1878 Treaty of Berlin),⁵⁰ on the basis that such a status was essentially a 'privilege' rather than an entitlement guaranteed as part of a contractual 'exchange'.⁵¹ In both cases, however, the response was to deny the necessity of any substantive exchange for purposes of conditioning the opposability of the obligations: no unilateral right of denunciation thus existed outside the terms specified within the agreements themselves.⁵² This, of course, was to not deny the importance of reciprocity but made clear that its content was a purely formal one: linking the obligations of one party to rights of performance on the part of another.

Lying behind the problem of substantive reciprocity, however, was a broader problem that concerned the effect of coercion upon the validity or otherwise of treaties – this being a problem, in particular, in the context of treaties of peace. In the first place, whilst jurists were increasingly concerned with emphasising the importance of freedom of consent for purposes of establishing the validity of treaty obligations, they nevertheless continued to be swayed by Grotius's intuition that since war could be held just on both sides, the absence of coercion was incapable of standing as an absolute condition of validity. De Martens, for example, came to the conclusion that 'in default of a superior judge, and in default of a right to judge in their own cause', violence must be treated as just and hence cannot be opposed to the validity of a treaty unless its injustice is so

⁴⁸ Van Dyck, *supra* n. 46, at p. 24. See, also, U. Özsu, 'Ottoman Empire' in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), pp. 429–448, at pp. 430–431 ('For the Ottoman sultans ... the capitulations were at root imperial decrees – unilaterally granted and unilaterally revocable pledges to non-Muslim sovereigns with which political alliances or trading partnerships had been struck ... These privileges were not to be confused with permanent rights. And the Ottoman State was not to be seen as engaged with a non-Muslim entity on terms of strict formal equality').

⁴⁹ See, generally, L. E. Thayer, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States', *AJIL*, 17 (1923), 207–233, at 224–225.

⁵⁰ 153 CTS 171.

⁵¹ A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 498.

⁵² See, generally, McNair, *ibid.*, at pp. 498–499, and Thayer, *supra* n. 49, at 225–226.

manifest ‘as not to leave the least doubt’.⁵³ In this context, jurists were ultimately only able to maintain their commitment to consent by introducing into their accounts new ‘safety clauses’ or by subtly changing the content of consent itself. In one direction, thus, jurists such as Paul Pradier Fodéré were to seek to obviate the possibility of ‘consensual slavery’ by adducing, in emergency, a right of unilateral denunciation:

Cases must necessarily be admitted in which the State must be able to declare itself freed from any engagement, even when it has not expressly reserved this right by a clause of the treaty. Respect for engagements contracted should not, for example, be pushed to a suicidal extent. Though a State may be required to execute burdensome engagements contracted by it, it cannot be asked to sacrifice its development and its existence to the execution of the treaty.⁵⁴

The limits of consent, in other words, found their expression in the fundamental social conditions of a State’s existence. It could not be used as an argument for suicide.⁵⁵

In a different direction, however, the value of autonomy to which consent appeared to give expression was often re-framed in social terms. Henry Wheaton, for example, was to suggest that:

⁵³ See, e.g., de Martens, *supra* n. 10, at p. 51. For a similar statement, see Hall, *supra* n. 30, at pp. 341–342.

⁵⁴ P. L. E. Pradier Fodéré, *Traité de Droit International Public Européen et Américain* (Vol. II) (Paris: Pedone, 1911), p. 264. See, also, Oppenheim who maintained that:

When the existence or the vital development of a state stands in unavoidable conflict with its treaty obligations, the latter must give way, for self-preservation and development, in accordance with the growth and the vital requirements of the nation, are the primary duties of every state.

No state would consent to any such treaty as would hinder it in the fulfilment of these primary duties. The consent of a state to a treaty presupposes a conviction that it is not fraught with danger to its existence and vital development. For this reason every treaty implies a condition that if by an unforeseen change of circumstances an obligation stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned.

L. Oppenheim, *International Law: A Treatise* (Vol. I) (London: Longmans & Co., 4th ed., 1926) (A. D. McNair ed.), p. 748.

⁵⁵ Woolsey refers, in similar sense, to the non-binding character of treaties in which the government ‘flagitiously sacrifices the interests of the nation which it represents. In this case the treacherous act of the government cannot be justly regarded as the act of the nation’: T. S. Woolsey, *Introduction to the Study of International Law* (New York, NY: Charles Scribner’s Sons, 1883), p. 168.

By the general principles of private jurisprudence, recognised by most, if not all, civilised countries, a contract obtained by violence is void. Freedom of consent is essential to the validity of every agreement, and contracts obtained under duress are void, because the general welfare of society requires that they should be so.⁵⁶

While he was to insist, like many others, upon the importance of 'freedom of consent' to the validity of every agreement, Wheaton carefully reshapes, here, the justificatory discourse underpinning it: the virtue of consent lying less in the expression it gave to the idea of sovereign autonomy, than in what it appeared to contribute to the 'general welfare' of society. In socializing consent in this way, Wheaton was able to circumvent what otherwise appeared to be a fundamental tension between upholding the value of consent but yet admitting the possibility of coercion or duress:

On the other hand, the welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party.⁵⁷

For Wheaton, then, the value of consent was to become subordinated to the more general social utility of maintaining the peace: the meaning and effect of any agreement being governed, ultimately, not by resort to the principle of free consent but by reference to the broader social purposes which the agreement appeared to advance.

Wheaton's concern to bring to the forefront the social conditions upon which an agreement might be thought to rest was one widely shared, particularly in respect of peace agreements given their putative role in the preservation of 'peace and good order' or the 'balance of power'.⁵⁸ Yet the more this tendency to 'contextualise' consent, or subordinate it to higher social imperatives, the more contingent its function was to become. It quickly became vulnerable, as a result, to arguments in favour of the termination of agreements when the circumstances upon which it was premised appeared to change. The doctrine *rebus sic stantibus* would thus emerge as a plausible ground for denunciation of putatively permanent agreements even if, in practice, it was frequently resisted. As Lord Arnold

⁵⁶ Wheaton, *supra* n. 45, at p. 340. ⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, at p. 39. In similar vein, see A. Rivier, *Principes du Droit des Gens* (Vol. II) (Paris: Arthur Rousseau, 1896), pp. 35–36.

McNair notes, the doctrine was (inferentially) relied upon by Russia in its repudiation of the Black Sea clauses (Articles 11, 12 and 13) of the 1856 Treaty of Paris⁵⁹ and by Austria-Hungary following its annexation of Bosnia-Herzegovina in 1907.⁶⁰ Whilst the 1871 London Protocol seemed to deny the possibility of fundamental change in its insistence upon the 'sanctity of treaties' and the requirement that treaty engagements might only be terminated with the consent of other parties,⁶¹ this was not to prevent it becoming a durable theme acquiring more specificity in the course of the twentieth century.

Thus, at the end of the nineteenth century, one was to find a conception of treaty law that was built, by analogy, upon the idea of individual consent to contractual obligation but in which two movements were perceptible. In one direction it was to become increasingly formal in the sense that it was emptied of any substantive evaluation of exchange and in which the condition of mutuality was sustained only so far as signature or ratification was required. In another direction, however, it was also to become increasingly 'social' in the sense that the validity and effect of consent were ever more closely linked to the political context in which it was located. No one, it seems, was willing to treat the absence of coercion as an absolute condition of validity. But at the same time no one was to rule out the possibility of denunciation if the 'political circumstances' so required.

On the face of it, these might appear to have been entirely contradictory tendencies. The more attention given to the social and political

⁵⁹ 114 CTS 409. See McNair, *supra* n. 51, at pp. 494–497 and 682.

⁶⁰ The annexation was inconsistent with Art. 25 of the 1878 Treaty of Berlin, *supra* n. 50, in which European Powers had agreed to the occupation and administration of the Turkish provinces of Bosnia and Herzegovina by Austria-Hungary.

⁶¹ The 1871 London Protocol, 143 CTS 99, provided that:

It is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable arrangement.

See, further, D. J. Bederman, 'The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations', *AJIL*, 82 (1988), 1–40, at 15; G. Distefano, 'Le Protocole de Londres du 17 Janvier 1871: Miroir du Droit International', *J. Hist. Int'l L.*, 6 (2004), 79–142, and L. H. Woolsey, 'The Unilateral Termination of Treaties', *AJIL*, 20 (1926), 346–353, at 349 ('This declaration . . . would seem to amount to no more than a declaration that a treaty cannot be annulled by one of the parties without the consent of the other in circumstances which involve no change in the fundamental conditions on which the treaty is based and which show no violation of the treaty by the other party').

setting in which treaties were located, the more it might seem that the content of treaties would have to become central to an evaluation of their validity. Consent could surely not be made both more formal and more social simultaneously. Yet one may also understand these movements to be entirely consonant with one another: to produce the idea of autonomous consent as a consistent marker of treaty validity required the removal of its social or material content. And this was achieved not by its total elimination but by shifting it from the inside to the outside – it was to become the ‘context’ within which the exchange was to take place rather than something that impinged upon the question whether consent itself had been given. A purely juridical conception of consent, in other words, was to be produced through the simultaneous construction of an autonomous external ‘political’ or ‘social’ environment within which it was embedded. The formalisation of consent, in other words, was intimately related to its embedding in a social environment.

4 The Conditions of Effective Consent

At the beginning of this modern period, as de Martens was to suggest, five things appeared ‘necessarily supposed’ for a treaty to be obligatory: ‘1. that the parties have power to consent; 2. that they have consented; 3. that they have consented freely; 4. that the consent is mutual; and 5. that the execution is possible’.⁶² All five of these ‘conditions of authenticity’ continue to be reflected in one form or another in the Vienna Convention. The question of authority to consent is addressed in Articles 6 to 8⁶³ dealing with the initial question of capacity, the validation of full powers and the subsequent ‘adoption’ of unauthorised agreements (sponsions).⁶⁴ The fact of consent – or rather the process by which consent might be evidenced – is addressed in Articles 11 to 15 dealing with signature, ratification, exchange of instruments, acceptance, approval and accession, supplemented by the provisions in Articles 34 to 38 governing the means by which third States may ‘assume’ rights or obligations in relation to an agreement to which (by definition) they are not party.⁶⁵ The question of freedom of consent understood as ‘the

⁶² De Martens (Vol. II), *supra* n. 10, at p. 48.

⁶³ See, also, *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*: Cameroon v. Nigeria (Judgment) (2002) ICJ Rep. 303, at p. 430 (paragraph 265).

⁶⁴ See, also, Art. 47 VCLT: *supra* n. 1.

⁶⁵ See, further, *North Sea Continental Shelf Cases*, *supra* n. 19, at pp. 25–26 (paragraphs 27–28).

absence of coercion' is addressed in Articles 51 and 52. Of relevance, here, are also the questions of error (Article 48), fraud (Article 49) and corruption (Article 50) which seek to engage with the conditions of knowledge and communication under which consent may be discerned to be fully free. Mutuality of consent is ensured through provisions relating to entry into force and termination following breach, and the final condition relating to execution finds expression in Article 61 governing supervening impossibility of performance.

If one takes the Vienna Convention, broadly speaking, as an attempt to institute a regime of law directed towards enabling or facilitating a system of 'mutual self-rule' through free consent, the most problematic features would seem to be those that appear to describe its limits – that dispense with consent, militate against it being 'free' or condition its effects by reference to the social or political environment. Each provides a slightly different account of the phenomenon called 'consent' that is being ushered into existence.

4.1 *The Necessity of Consent*

The Vienna Convention is overtly rigorous about the necessity of consent for purposes of the assumption of obligations under treaty. Whilst it makes no claims as to the broader significance of consent in relation to customary international law, so far as treaties are concerned, obligation follows consent (rather than the other way round).⁶⁶ Yet the Convention clearly also provides certain stipulations that describe what meaning is to be attributed to consent. A simple example here is the move initiated by Lauterpacht amongst others away from the 'principle' of unanimous consent in the context of multilateral agreements. In admitting that there was no right of 'accession',⁶⁷ he was to encourage the view that if a multilateral agreement provided for the possibility of accession, the formal act of consent also implied tacit consent to the participation of any other party that subsequently undertakes the requisite formalities. No additional act of 'consent' should be required unless specified by

⁶⁶ See, here, *International Status of South-West Africa* (Advisory Opinion) (1950) ICJ Rep. 128, at p. 139 (an obligation to conclude an agreement is a contradiction in terms: 'An "agreement" implies consent of the parties concerned . . . The parties must be free to accept or reject the terms of the contemplated agreement. No party can impose its terms on the other party').

⁶⁷ See, e.g., *Case Concerning Certain German Interests in Polish Upper Silesia*: Germany v. Poland (Merits), 1926 PCIJ, Series A, No. 7, 19, at pp. 28–29.

the terms of the agreement.⁶⁸ Of course, in a sense, this goes to the content of consent itself, and it is obviously arguable that if the treaty allows for the participation of other States, consent to the agreement also necessarily implies consent to the participation by all, or any, other States. But it is equally clear that in setting such matters out in general provisions, a formalized distance is thus erected between actual and imputed intentions: tacit consent being less concerned with the actual content of the original agreement (as might be discerned, for example, through expressed intentions) than with the imputation of certain rational intentions to the author.

This kind of regulatory architecture is carried throughout the Vienna Convention: interpretation is not governed by the actual intentions of the authors but by the 'ordinary meaning' that may be given to its terms (although the *travaux préparatoires* may be resorted to as a supplementary means of interpretation);⁶⁹ error may vitiate consent only if it formed an essential basis for participation and was not otherwise a consequence of the negligence of the party concerned (Article 48); fraud is relevant only so far as it may be evidenced and attributed to another negotiating party (Article 49). That the Convention regulates consent in this way is wholly unsurprising in the sense that were it not to do so, the principle of *pacta sunt servanda* would be virtually emptied of content by a practice of self-judgment. But the point that consent, here, is separated from the putatively psychological conditions of intentionality and motive⁷⁰ or that States may be treated as having consented even in circumstances in which they might think they have not is nevertheless revealing: the concern being not so much to mirror social life as to provide an idealised account of it.

Even if the Vienna Convention is largely structured around the operationalization of the idea of consent, there are several circumstances in which the necessity of consent is attenuated. Reservations do not always

⁶⁸ See, e.g., Art. 4 of 1899 Hague Convention (II) With Respect to the Laws and Customs of War and Its Annex, 187 CTS 429, and Art. 6 of 1907 Hague Convention (IV) With Respect to Laws and Customs of War on Land, 205 CTS 277. See, also, Art. 10 of 1949 North Atlantic Treaty, 243 UNTS 34 (accession by invitation).

⁶⁹ Art. 31 VCLT: *supra* n. 1. Reuter comments, in this regard, that 'law cannot take into consideration anything that remains buried away in the minds of the parties'. 'Will' he suggests must be 'spelled out': P. Reuter, *Introduction to the Law of Treaties* (Geneva: Geneva Institute of International Studies, 2nd ed., 1995), p. 30.

⁷⁰ Fitzmaurice comments, in this vein, that a treaty is both a text and a legal transaction: 'In the latter sense, the treaty evidences but does not constitute the agreement'. See Fitzmaurice, First Report on the Law of Treaties, *supra* n. 13, at p. 110.

require acceptance by other parties,⁷¹ rights in favour of third parties might be established or withdrawn without express consent,⁷² and two or more parties may ‘modify’ the terms of the agreement *inter se* without the consent of other parties.⁷³ The one field in which the necessity of consent is most problematic, however, is that which was explicitly left outside the terms of the 1969 Vienna Convention – State succession.⁷⁴

On the face of it, the term ‘succession’ implies a regulated process by which rights and obligations assumed by one legal person are ‘inherited’ by another. In the context of treaty law, thus, it brings to mind a process by which a ‘successor’ might assume such rights and obligations as might arise from a treaty signed and/or ratified by its historic forbear as a consequence of the operation of certain general rules, as opposed to through the medium of a separate act of consent. To use the terminology of the 1978 Vienna Convention on the Succession of States in Respect of Treaties (VCSST),⁷⁵ the successor may be seen to ‘replace’ the ‘predecessor’ State in its responsibility for treaty relations of a specified territory – stepping into its legal shoes, so to speak, by reason of rules of inheritance rather than by act of will.

Behind this superficial gloss are two very different ideas. The first relates to the tacit or implied effects of the original act of consent. It is ordinarily imagined that if a government ratifies an international agreement, it (or rather the ‘State’) will continue to be bound by that agreement for the future until such a juncture as the treaty ceases to have effect in accordance with the terms of the agreement or under the terms of general international law. Such consent, it is supposed, is not to be vitiated by incidental changes in the local environment such as a change in government or a change in the identity of those responsible for concluding international agreements.⁷⁶ Only, as far as the Vienna Convention is concerned, would a ‘fundamental change of circumstances’ warrant the termination of the agreement (which of course implies the continuity of the agreement until the moment at which that idea is invoked). Seen in such terms, a succession of States (whether

⁷¹ See Arts. 19 to 23 VCLT: *supra* n. 1. ⁷² Arts. 36 and 37 VCLT: *ibid*.

⁷³ On the assumption that their own rights and obligations are not impaired as a consequence: Art. 41 VCLT: *ibid*.

⁷⁴ See Art. 73 VCLT (“The provisions of the present Convention shall not prejudice any question that may arise in relation to a treaty from a succession of States”): *ibid*.

⁷⁵ *Supra* n. 1.

⁷⁶ See G. G. Fitzmaurice, Fourth Report on the Law of Treaties, Doc. A/CN.4/120 (17 March 1959), p. 43.

through separation or unification) would not affect the binding character of treaty obligations insofar as the ‘successor’ could simply be treated as inheriting the obligations of the predecessor, much like a new government would inherit the obligations of the old. No additional act of consent would be needed, and all treaties would continue, so far as possible, in the adjusted social environment.⁷⁷ In this account, the analytic by which succession is to be conceptualised is one that pays attention to the question of identity: the successor State *is* the predecessor State for purposes of performing its international obligations.

The second, and contrasting, idea is that succession denotes the acceptance or imposition of treaty obligations assumed by one party, upon what is, to all intents and purposes, a third party to the original agreement. The term ‘succession’ being indicative merely of the historic social and political connections that bind the predecessor and successor States together (the fact, for example, that both exercised jurisdiction over the same space at different moments in time) and to the fact that, in some instances at least, the treaty obligations in question might already have been applied or executed on the territory of the successor. In this form, the regulatory architecture of succession would seek to operationalize the transfer or assignment of obligations from one party to another but in which case consent of both the successor State and other States parties would presumably be necessary.⁷⁸

As if attempting to respond to the problem of identity (sameness/difference) that segments these two conceptions of succession, the VCSSRT cuts through the divergence in two different ways. In the first place, it posits a typology of social and political organization that differentiates between different kinds of political change along two lines: between, on the one hand, aggregative processes of unification or federation and dis-aggregative processes of dissolution and secession (with ‘cession’ as a hybrid) and, on the other, between processes that result in the formation of ‘newly independent States’ and those that do not. Here, a spatial analytics of expansion and contraction is overlaid by a more fundamental differentiation that conditions the effects of any change upon the identification of States as ‘new’ or ‘old’. A presumption in favour of treaty continuity operates in case of ‘old’ but not ‘new’ States. In the second place, this organizational frame is then qualified by

⁷⁷ See, e.g., D. P. O’Connell, *State Succession in Municipal and International Law* (Vol. II) (Cambridge: Cambridge University Press, 1967), pp. 88–89.

⁷⁸ See McNair, *supra* n. 51, at p. 601, and G. G. Fitzmaurice, Fifth Report on the Law of Treaties, Doc. A/CN.4/130 (21 March 1960), p. 94.

a further functional typology by which different kinds of treaty are regarded as having different effects: bilateral treaties do not always survive; territorial and boundary treaties (or their 'regimes') generally do.⁷⁹ Succession to constituent instruments depends upon the 'rules of the organization' concerned (Article 4) and hence subject to the political and diplomatic processes governing admission.

The complex analytics put in play here has much to tell us about the imputed character of consent in case of treaties. In the first place, it forefronts one of the most self-evidential, but also most elusive, aspects of the question of consent: who is it that might be said to be consenting, and on whose behalf? In normal circumstances, the answer to both elements is usually a simple one: the 'State'. But it is equally clear, as has already been pointed out, that the State itself never consents in and of its own right but only through the medium of its representatives or agents. And it is here that the problem of succession arises: how, if that is the basis for consent, does it survive the reconfiguration of that relationship of authority? What conditions of political legitimacy are necessary for consent to have the effects prescribed? The general intuition, as Paul Reuter observed, was that:

when the personality of the new State expresses a genuine and autonomous social reality, commitments are not transmitted, but when it has in fact had a part in the formation of its predecessor's commitments there is a substantial continuity and commitments are transmitted to the successor State.⁸⁰

Yet, as the International Law Commission (ILC) ultimately appreciated, the kind of judgment required for sustaining this distinction could never satisfactorily be elaborated without drifting into arbitrariness (What level of participation is required? What indices determine genuine, as opposed to fictional, autonomy?). The final formula adopted for the Convention – that 'new States' were effectively those that enjoyed a right to self-determination – really just deferred the question.

In the second place, if the questions of political legitimacy and participation were to haunt the evaluation of whether treaties, in general, should continue, the Vienna Convention was to soften its implications in two different ways. On the one hand, new States were not entirely cast adrift but enjoyed, according to the ILC's controversial formula, a 'right

⁷⁹ Arts. 11 and 12 VCLT: *supra* n. 1. See, further, *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep. 7, at pp. 71–72.

⁸⁰ Reuter, *supra* n. 69, at p. 113.

of option' – a right to notify, by unilateral act, their succession to multi-lateral agreements under conditions not entirely dissimilar to that of accession (in the sense that new reservations might be made and its effect is to constitute the State a party from the date of notification)⁸¹ but yet outside the process for accession that may otherwise be laid down in the agreement itself. 'New States', in that sense, were never entirely 'new'.⁸² On the other hand, 'territorial' and 'boundary' regimes automatically continued irrespective of the political conditions underpinning the original expression of consent. The rationale for such regimes continuing to subsist despite the (potential) defects in consent was, at once, performative and constitutive. In the first instance, they were understood to be regimes whose validity was seen to stem from the fact of their materialisation. They were no longer simply 'agreements' contingent for their validity upon consent but were the products of their execution: regimes that had imprinted themselves on the territory creating rights and obligations *erga omnes*.⁸³ In the second place, their indelible character, furthermore, stemmed not merely from the fact that they gave permanence and security to the 'new' State – placing its borders beyond the field of political contestation – but from the fact that they also supplied its essential preconditions. The border, as Étienne Balibar succinctly put it, constituted one of the 'nondemocratic conditions of democracy'.⁸⁴

In case of succession, thus, two implicit conditions of consent are laid bare, whose appearance in case of 'crisis' is only to highlight their absence otherwise. On one side, it would seem to demand a level of authenticity – demand that consent itself be rooted in a genuine, popular, social consciousness; that it be neither repressive nor authoritarian. On the other side, and in order for it to bear this democratic overtone, consent is dependent upon the spatial pre-configuration of the 'demos' in relation to which there is no possibility of collective agency: no consent could be given to that which made consent possible. If revolution has the habit of exposing the unspoken preconditions of political rule, the problem of succession does the same for treaties – they rely upon the idea of

⁸¹ Arts. 17 to 23 VCRSST: *supra* n. 1.

⁸² On the 'legal nexus', see M. Craven, *The Decolonisation of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007), pp. 141–147.

⁸³ See *Case Concerning Gabčíkovo-Nagymaros Project*, *supra* n. 79, at pp. 71–72 (paragraph 123) (the treaty 'inescapably created a situation in which the interests of other users of the Danube were affected'). See, also, the contribution to this volume of Waibel at pp. 201–236 (Chapter 8).

⁸⁴ É. Balibar, *We the People of Europe? Reflections on Transnational Citizenship* (Princeton, NJ: Princeton University Press, 2004), p. 109.

a positive, affirmative, social consensus underpinning the acts of governmental agencies (and by reference to which it may be measured) but yet are conditioned upon the impossibility of any such social consensus grounding itself (in the sense that some prior determination of its parameters is required).⁸⁵

4.2 *Freedom of Consent*

Whilst succession poses the problem as to who may, or may not, have consented, the problem of coercion goes more directly to the question of its content. The legal regulation of the use of force in the twentieth century, as Lauterpacht was to suggest, was central to 'the restoration of the missing link of analogy of contracts and treaties, i.e. of the freedom of will as a requirement for the validity of treaties'.⁸⁶ The earlier position, as he was to explain, rendered any such equation problematic:

[Since] war was permitted as an institution, it followed that the law was bound to recognize the results of successful use of force thus used. To this explanation, unimpeachable in logic, of the legal position there was added the cogent consideration that the adoption of a different rule would have removed the legal basis of all treaties imposed by the victor upon the defeated state and thus perpetuated indefinitely a state of war. While the persuasive power of these considerations could not be denied, it was clear that the disregard of the vitiating force of duress in the conclusion of treaties tended to constitute, in a real sense, a denial of the legal nature of treaties conceived as agreements based on the free will of the contracting parties.⁸⁷

It was thus only by removing the possibility that war could be resorted to as a legal remedy that it could be established that 'a treaty imposed by or as a result of force or threats of force resorted to in violation of the principles of these instruments of a fundamental character is invalid by virtue of the operation of the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings'.⁸⁸ Whilst jurists had been clearly reluctant to perfect this move in the inter-war years (particularly insofar as the terms of the 1919

⁸⁵ E. Laclau, *Emancipation(s)* (London: Verso, 1996), pp. 1–19.

⁸⁶ H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (London: Longmans, Green & Co., 1927), p. 166.

⁸⁷ H. Lauterpacht, First Report on the Law of Treaties, Doc. A/CN.4/63 (24 March 1953), p. 147.

⁸⁸ *Ibid.*, p. 148 (paragraph 3).

Treaty of Versailles itself would have been called into question),⁸⁹ Lauterpacht's intuitions were subsequently endorsed in the form of Article 52 VCLT, which renders void any treaty procured by the threat or use of force in violation of the principles of the United Nations Charter.⁹⁰

In his discussion of the question at the ILC, however, Lauterpacht was to draw attention to the significance of the final phraseology of what was to become Article 52 VCLT. Inclusion of the phrase 'in violation of the principles of the Charter of the United Nations' was to draw attention to the fact that the problem of duress was to be situated within the framework of Charter principles governing coercion. As the Charter only prohibited the 'unlawful threat and use of force'⁹¹ – and, hence, left open the possibility of defensive violence, force authorised by the

⁸⁹ 225 CTS 188. See, e.g., J. L. Kunz, 'The Meaning and Scope of the Norm *Pacta Sunt Servanda*', *AJIL*, 39 (1945), 180–197, at 185, and McNair, *supra* n. 51, at pp. 139–140. Such a position was also apparently upheld by Fitzmaurice in his reports to the ILC concerning the effect of duress: Third Report on the Law of Treaties, *supra* n. 2, at p. 26. But see Art. 4(3) of the Harvard Draft Convention on Rights and Duties of States in Case of Aggression, *AJIL Supp.*, 33 (1939), 819–909, at 895 ('A treaty brought about by an aggressor's use of armed force is voidable'). Concern over the Munich Agreement was clearly a considerable spur in this regards: see, e.g., Q. Wright, 'The Munich Settlement and International Law', *AJIL*, 33 (1939), 12–32, at 22–23 (arguing that the authors of the Munich Settlement had erred in the same way as had those of the Versailles agreement in placing substance before procedure).

⁹⁰ Cf. *Fisheries Jurisdiction Case: United Kingdom v. Iceland* (Jurisdiction) (1973) ICJ Rep. 3, at p. 14 (paragraph 24) ('There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void').

⁹¹ Schmitt remarks that 'to demand of a politically united people that it wage war for a just cause only is either something self-evident, if it means that war can be risked only against a real enemy, or it is a hidden political aspiration of some other party to wrest from the state its *jus belli* and to find norms of justice whose content and application in the concrete case is not decided upon by the State but by another party, and thereby it determines who the enemy is'. See C. Schmitt, *The Concept of the Political* (Cambridge, MA: MIT Press, 1996), p. 49. He continues (at pp. 50–51) by remarking that the Kellogg-Briand Pact 'neither repudiated war as an instrument of international politics . . . nor condemned nor outlawed war altogether'. This, he reasoned, followed from the fact that the declaration was subject to the specific exception of self-defence which, far from being a mere exception, gave the norm its concrete content – it was for each State to determine for itself the justification in question. He concluded, in that respect, that 'the solemn declaration of outlawing war does not abolish the friend-enemy distinction, but, on the contrary, opens new possibilities by giving an international *hostis* declaration new content and new vigour'. Thus (on p. 56) he concludes: 'the Geneva League of Nations does not eliminate the possibility of wars, just as it does not abolish states. It introduces new possibilities for wars to take place, sanctions coalition wars, and by legitimizing and sanctioning certain wars it sweeps away many obstacles to war'.

Council itself,⁹² as well as the use of coercion falling short of ‘armed force’ itself⁹³ – the problem of duress, or palpable lack of consent, was obviously to re-appear. For Lauterpacht, the response was to be found in a differentiation between forms of coercion:

Force ceases to have the character of mere coercion if it is exercised in execution of the law – as a legal sanction – or in accordance with the law. Although in such cases the element of consent on the part of the State concerned is lacking, the impersonal authority of the law on behalf of which – and in accordance with which – force is employed is properly deemed to supply, or to remedy, the absent element of consent.⁹⁴

Lauterpacht’s intention here seems to be to try to do two things. In the first place, and most obviously, he seems to want to distinguish the existence of coercion preliminary to the conclusion of an agreement from the identification of ‘duress’ as a feature that nullifies the effect of such an agreement. Only if the former is treated as ‘unlawful’ (‘mere coercion’) would the issue of duress come to be entertained.⁹⁵ And that would be the case even if there were no doubt as to the significance of the coercion in procuring the consent of the subordinate party. In the second place, he also wants to assign to the ‘impersonal character of the law’ a remedial capacity – a capacity to affirm the validity of consent ‘as if’ it had been freely given. ‘Freedom of consent’, in other words, is to be re-shaped: gone is any sense that it corresponds to a free exercise of will. Rather it assumes the character of a mere formal ‘absence of constraint exercised otherwise than by law’.⁹⁶

⁹² Cf. Commentary to Arts. 49 and 70 VCLT, *YbILC* (1966–II), 246–247 and 268.

⁹³ On economic coercion, see, the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, annexed to the Final Act of the Vienna Conference on the Law of Treaties: Doc. A/CONF.39/26. An account of proceedings leading to the declaration may be found in C. Murphy, ‘Economic Duress and Unequal Treaties’, *Virginia JIL*, 11 (1970), 51–69.

⁹⁴ Lauterpacht, First Report on the Law of Treaties, *supra* n. 87, at p. 150 (paragraph 9). Brierly makes a similar point (*supra* n. 9, at p. 319): ‘The true anomaly in the present law is not that it should be legal to coerce a state into accepting obligations which it does not like, but that it should be legal for a state which has been victorious in a war to do the coercing; and the change to which we ought to look forward is not the elimination of the use of coercion from the transaction, but the establishment of international machinery to ensure that when coercion is used it shall be in a proper case and by due process of law, and not, as present it may be, arbitrarily’.

⁹⁵ It is interesting to note the contrast between Art. 52 VCLT, which qualifies coercion of the ‘State’ in this way, to the unqualified terms of Art. 51 so far as concerns the coercion of a ‘representative of the State’: *supra* n. 1.

⁹⁶ Lauterpacht, First Report on the Law of Treaties, *supra* n. 87, at p. 149 (paragraph 6).

There are three particular consequences that seem to flow from this. The first is that the requirement that consent be 'free' is thereby largely conditioned by the extent to which the actions of the party exercising coercion are regarded as lawful or unlawful.⁹⁷ The focus is therefore shifted entirely away from the quality of consent exercised by the party experiencing duress: coerced consent may still be consent. In the second place, it offers an analytic in which coercion and consent are entirely separable – in which the presence or absence of unlawful coercion becomes, in a sense, an *ex post facto* qualification on the *effect* of consent. Unlawful coercion is something that has to be established as a way of impugning an agreement whose initial validity is the starting point. As the ICJ was to insist in the *Fisheries Jurisdiction Case*, any 'accusation' of coercion for purposes of disputing the validity of an agreement had to be accompanied by 'clear evidence' that went above and beyond, in that case, the mere presence of naval forces off the coast of the State concerned.⁹⁸ In the third place, and fairly obviously, in conflating 'duress' with the more general conditions that delimit unlawful threats and use of force, a whole host of other forms of economic and political pressure are immediately put beyond its reach.

If coercion and duress are separated in this way, however, the original argument that the prohibition of duress was essential for purposes of perfecting the analogy between the treaty and the contract by ensuring autonomous consent as a constitutive feature of treaty obligations was to become that much harder to maintain.⁹⁹ To the extent that coercion is rendered largely compatible with consent, the problem would no longer seem to be a problem of treaty law, but rather, as James L. Brierly suggests, 'a particular aspect of that much wider problem which pervades the whole system, that of subordinating the use of force to law'.¹⁰⁰ This idea is taken up by Sir Ian Sinclair, who, in his analysis of the Vienna Convention, suggests that:

⁹⁷ Under Art. 75 VCLT, provisions of the Vienna Convention 'are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression': *supra* n. 1.

⁹⁸ *Fisheries Jurisdiction Case*, *supra* n. 90, at p. 14 (paragraph 24).

⁹⁹ Caflisch remarks that '[a]n imbalance of treaty obligations might carry a conclusive presumption or at least the suggestion that a party, on account of its political or economic dependence from its partner(s), did not enter into the treaty out of its own free will, for no 'reasonable State' can be assumed to have concluded an agreement disadvantageous to it'. See L. Caflisch, 'Unequal Treaties', *German YbIL*, 35 (1992), 52–80, at 53. This supposition is later rejected by the author as unfounded.

¹⁰⁰ Brierly, *supra* n. 9, at p. 319.

coercion of a State by the threat or use of force does not, strictly speaking, vitiate consent; it rather involves the commission of an international delict with all the sanctions attached thereto.¹⁰¹

In a positive sense, Sinclair seems to draw upon the point made by Lauterpacht to the effect that the nullification of an agreement following an unlawful act could, in some senses, be regarded as analogous to an obligation not to recognise an unlawful situation.¹⁰² Whilst for Lauterpacht this was a crucial move in his articulation of the emergent prohibition on duress, for Sinclair it clearly works in a different direction. Having discussed the perils of giving heed to the idea of economic duress,¹⁰³ he goes on to suggest that 'consent' needed to be stripped of its associations with a factual 'absence of coercion' as Lauterpacht had suggested. Consent, rather, should be associated merely with the formal mode of acceptance of an instrument – signified by signature, ratification or accession – in which any investigation of the content of the 'agreement' was beyond the domain of law and the presence or absence of duress largely irrelevant.¹⁰⁴ Duress, for Sinclair, thus operates as an independent variable that may (or may not) render an agreement invalid 'by operation of law' rather than something that goes to an evaluation as to whether or not there has been an agreement in the first place.¹⁰⁵ He shares, in that sense, the view of Fitzmaurice, who, when proposing the distinction between formal and essential validity, was to

¹⁰¹ Sinclair, *supra* n. 13, at p. 180. See, also, Reuter, *supra* n. 69, at pp. 180–181 ('Invalidity can . . . hardly be regarded as a result of vitiated consent; it is rather a sanction of an international offence').

¹⁰² See, also, I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), pp. 404–405 ('State practice in regard to the effect of duress is in part connected with the development of the principle of non-recognition of territorial acquisitions obtained by the threat or use of force').

¹⁰³ Sinclair, *supra* n. 13, at p. 178.

¹⁰⁴ See, e.g., Memorandum of the Solicitor for the Department of State, 30 June 1921, in which it was noted, in reference to German signature of the Treaty of Versailles, *supra* n. 89, that 'even though a vanquished nation is in effect compelled to sign a treaty, I think that in contemplation of law its signature is regarded as voluntary'. Cited in G. H. Hackworth, *Digest of International Law* (Vol. V) (Washington, DC: U.S. Govt. Printing Office, 1940), p. 158.

¹⁰⁵ This point is taken up by Nahlik, who notes that Sir Humphrey Waldock, Fourth Special Rapporteur of the International Law Commission for the Law of Treaties, 'chose to speak about *invalidity* only, with hardly anything stated about *validity* of treaties'. This 'negative' approach to the issue necessarily placed 'a presumption in favour of the validity and binding force of treaties. A treaty, *any* treaty, is presumed to be valid and in force *unless* one of the grounds listed in the convention has occurred'. See S. E. Nahlik, 'The Grounds of Invalidity and Termination of Treaties', *AJIL*, 65 (1971), 736–756, at 738 and 739–740.

suggest that the determination as to what is an agreement under international law is ultimately separable from (and, in some ways, prior to) the question as to whether or not it is a nullity.¹⁰⁶

What seems to be revealed here is an array of at least three different ways of thinking about consent and its place in the law of treaties. The first formulation is that of an exercise of free will whose essential conditions are to be determined by the presence or absence of coercion (and perhaps including also the absence of mistake, error or fraud) but whose field of operation, it is reasoned, must necessarily be limited in view of the social desirability of certain forms of coerced agreements (peace treaties). The second is a formalised version of the first in which consent is conceptualised as contingent upon a distinction being made between lawful and unlawful coercion. 'Free will' here is not the free will of a radically autonomous agent but a legally regulated freedom the parameters of which are dependent upon the general constraints imposed by international law upon the use of force or other forms of coercion and in which consent is 'presumed' or its absence 'remedied' in cases in which coercion is lawful. The third is entirely procedural and in which consent is conceived, as Fitzmaurice puts it, as merely 'a method . . . by which obligations arise or come into force' but which is yet independent of the binding force of the obligations once in place. Duress, so far as it attends to the problem of substantive validity, is entirely separable from the process of offering consent (through signature, ratification accession etc.).

For all their differences, all three of these accounts seek to do the same thing: to provide different ways of keeping the ideas of consent and coercion apart. Only by insulating the idea of consent in some way from the possibility of an entirely routine form of coercion can it survive as a means of providing the grounds for obligation. And this, in a sense, is encapsulated in Sinclair's fear that '[a]cceptance of the concept that economic pressure could operate to render a treaty null and void would . . . put at risk any treaty concluded between a developing and a developed country'.¹⁰⁷ As a consequence, thus, one finds coercion itself being re-configured along a dynamic that excludes from view a range of forms of economic and non-armed coercion (as well, of course, as legitimate armed coercion) and consent being re-configured into an entirely formal or procedural idea separated from the social conditions that may impinge upon its substantive content.

¹⁰⁶ Fitzmaurice, First Report on the Law of Treaties, *supra* n. 13, at p. 109.

¹⁰⁷ Sinclair, *supra* n. 13, at p. 178.

5 The Limits of Consent

If, thus far, I have been dealing with the problem of the affirmation of free will through its denial, there is also the related issue of its limitation – of the circumstances in which consent is not denied or rendered dispensable but when consent is understood to encounter certain limits upon its effect. There are two possible categories here, both of which are essentially ‘contextual’ or ‘environmental’: on the one hand there are normative limits which putatively restrict the capacity of States to enter into agreements that violate some other, more fundamental, principle of international law (*jus cogens*);¹⁰⁸ on the other hand there are factual limits which circumscribe the effect of obligations by reference to some evaluation of the social conditions under which the obligations are to be put into operation. To the extent that the former is concerned with relationship between formal acts of consent and the extant legal environment that might putatively govern their effect, I have already covered much of the ground earlier in dealing with the question of coercion.¹⁰⁹ What I have not addressed is the putative relationship that might exist between the act of consent and its social, political or economic environment.

Within the Vienna Convention, two principles are given prominence here – one being the principle of supervening impossibility of performance;¹¹⁰ the other, the principle of fundamental change of circumstances.¹¹¹ Both share an analytic¹¹² which seeks to relate the act

¹⁰⁸ Arts. 53 and 64 VCLT: *supra* n. 1.

¹⁰⁹ Reference, here, may also be made to Art. 32(2) VCLT, which specifies the relevant legal ‘context’ for purposes of interpretation: *ibid*.

¹¹⁰ Art. 61 VCLT: *ibid*. See, further, *Case Concerning Gabčíkovo-Nagymaros Project*, *supra* n. 79, at pp. 56–64.

¹¹¹ Art. 62 VCLT (‘A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty’): *ibid*. For an early appraisal, see, generally, C. Hill, *The Doctrine of Rebus Sic Stantibus* (Columbia, MO: University of Missouri, 1934). See, also, *Free Zones of Upper Savoy and District of Gex Case*: France v. Switzerland, 1932 PCIJ, Series A/B, No. 46, 97, at pp. 156–158; *Nationality Decrees in Tunis and Morocco*, 1923 PCIJ, Series B, No. 4, 29, and *Fisheries Jurisdiction Case*, *supra* n. 90, at p. 18.

¹¹² As Fitzmaurice describes it: ‘where a supervening impossibility does arise, a change of circumstances, and an essential one, must have occurred. But although the case of impossibility might therefore be represented as being one of *rebus sic stantibus*, it is clear that the latter principle is not limited to cases of actual impossibility’. See

of 'consenting' or 'promising' to a particular social and political (and perhaps even legal)¹¹³ context and then offer the possibility of excusing one party from an obligation of performance by reason of some extraneous change in that external environment. It is only here that the act of consenting to obligation appears to be understood as a social experience as opposed to a highly formalised act. Consent not being the abstract formal decision of a legal actor in hypothetical space but that of a concrete, socially situated actor seeking to secure certain material objectives in a given political and social environment.

On the face of it, there is a significant contrast to be drawn here between the socially aware form of consent which is recognised in these principles and the more abstract or formal conception employed in case of duress, or indeed the more 'authentic' or 'consensual' idea that operates in case of succession. In case of duress, for example, a world is constructed in which power becomes visible only in case of unlawful violence. Other forms of economic and political pressure that might in practice be influential lack legitimacy. In case of succession, relations of domination and subordination might form the intelligible backdrop to the distinction between 'new' and 'old' States, but these are once again reduced to formal categories determined by whether the territory in question was formerly describable as 'dependent' prior to the moment of independence. It is not surprising, therefore, that in the drafting of the Vienna Convention, some States saw in the doctrine *rebus sic stantibus* a vital response to the problem of unequal or imposed treaties.¹¹⁴

But even then, appearances are somewhat deceptive – in case of fundamental change, what is in question is less the experience or intentions of the subject (which only remain relevant so far as determining whether the change was 'foreseen by the parties'),¹¹⁵ still less with

Fitzmaurice, Second Report on the Law of Treaties, *supra* n. 5, at p. 60. See, also, Commentary to Art. 58, *YbILC* (1966–II), 255–256.

¹¹³ See *Fisheries Jurisdiction Case*, *supra* n. 90, at p. 17.

¹¹⁴ See, also, *Denunciation of the Sino-Belgian Treaty of 2 Nov. 1865*, 1929 PCIJ, Series A, No. 18, I, 52.

¹¹⁵ Earlier authors had preferred to treat the 'clausula' as an implied term. See, e.g., Brierly, *supra* n. 9, at p. 336 ('the treaty is ended because we can infer from its terms that the parties, though they have not said expressly what was to happen in the event which has occurred, would, if they had foreseen it, have said that the treaty ought to lapse'). Waldock and Fitzmaurice, amongst others, sought to provide it with an 'objective' basis. See Fitzmaurice, Second Report on the Law of Treaties, *supra* n. 5, at pp. 58–60. As Fitzmaurice describes it, the *rebus* may be considered 'as a rule which, irrespective of anything expressed or implied in the treaty, may give the parties a faculty to take steps directed to the revision or termination of the treaty, operates independently of the will of

a straightforward evaluation as to whether the transformation of the external environment made it implausible to insist upon continued performance.¹¹⁶ Rather, it involves identifying the ‘essential basis’ for consent (quite independently of the question of motive) and then determining whether the change was such as to ‘radically’ transform the extent of obligations to be performed. The impugned treaty, in other words, has to be both obsolete *and* oppressive, not just one in isolation from the other.

This analytic appears to tell us two things about consent. First, it is to be recognised as having a social context from which the meaning of an act of consent partially draws sustenance. Consent has a time and place and certain material conditions to which it is invisibly tied. That context, however, does not condition consent in the sense of determining its formal validity or effect *ab initio* but emerges as a ground for termination only in circumstances in which it is deemed to have changed. Secondly, the central intuition would appear to be that the social/political context in which the expression of consent is embedded must be conceptualised as expressive of some kind of ‘natural condition’, such that any change in that *status quo* must be resisted, and resisted in the name of ‘law’.¹¹⁷ Whilst this may leave us with the impression that international law simply operates to conserve an existing order of power – visibly opposing attempts to question the authority of ‘agreements’ underpinned by ‘legitimate’ threats – the more important point, as I have been trying to suggest, is that it asks us to take seriously the world that ‘consent to obligation’ evokes into being.

the parties except at the point where a party invokes it’. See, also, H. Waldock, Second Report on the Law of Treaties, Doc. A/CN.4/156 and Add.1–3 (20 March, 10 Apr., 30 Apr. and 5 June 1963), pp. 79–85. See, generally, Commentary to draft Art. 59, *YbILC* (1966–II), 256–260 (esp. paragraph 7: ‘In most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner . . . the theory of an implied term must be rejected’).

¹¹⁶ See, e.g., Brierly, *supra* n. 9, at p. 332 (‘It may be, therefore, that if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation’).

¹¹⁷ It is in this sense that the doctrine was closely related to the ‘problem of peaceful change’. See, e.g., Q. Wright, ‘Article 19 of the League Covenant and the Doctrine of “Rebus sic Stantibus”’, *Proceedings ASIL*, 30 (1936), 55–73, at 59 (‘Every legal system in a progressive society needs procedures for changing the law in order to keep it abreast of the sociological facts of the community, and procedures by which the members of the community can acquire and transfer rights within the law . . . But such extraordinary procedures must be resorted to with restraint and under the authority of the community as a whole, or the society will cease to be one of law’).

6 Conclusion

If the regime of the law of treaties as articulated in the Vienna Convention(s) might be thought to organise itself around the legitimating idea of 'consent to obligation', consent is only nominally the starting point. Its principal function, one may imagine, is to immunise international legal obligation from a critique of power politics: instantiating in the form of the contract, the principle of sovereign equality and the idea of self-rule. Its pedagogy thus is one of virtue and restraint. It is clear, however, that even this idea of self-rule can never be just 'rule of the self'. It must always be conditioned, regularized, encased in rules and their exceptions and organised as a social category. And the Vienna Convention, one may think, does precisely that job. From this vantage point, one may simply ask how coherently it does that. How 'free' does it leave consent? What constraints may impinge upon it?

But there is another account of the Convention that I have been trying to sketch out here, which starts in a different place. Rather than suppose the pre-existence of a phenomenological category of State consent and then look at how it is organised and controlled, I have been trying to think of it as an idea (or set of ideas) produced or generated, in part at least, through the terms of the Vienna Convention. The hypothesis here is that State consent acquires meaning only at the point at which it is controlled or regularized – that it appears only through the act of its apparent limitation. From this standpoint, the Convention assumes a very different guise: operating as a way of enjoining us to believe in the reality of 'consent', inciting us to organise our conceptions of coercion in a way that does not displace the (apparent) reality of sovereign free will, encouraging the acting out of a set of ceremonial formalities the overall purpose of which being to generate the idea of faith, obligation and belief in law. To pursue this line of thought is to think of consent not as the beginning of our enquiry but as the end: as the ideational output of a machinery of consent-formation with its own forms of capital, labour and exchange.